STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 19, 2006
v	No. 260165 Berrien Circuit Court
WILLIE JOE DEPRIEST, JR., Defendant-Appellant.	LC No. 04-401613-FC

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, riot, MCL 752.541, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 25 to 60 years for the assault conviction[1] and 10 to 30 years for the riot conviction, and to a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant's conviction arises from a shooting incident on March 28, 2004. A large crowd of 300 to 400 people had gathered in Benton Harbor and was throwing bricks, rocks, and bottles at police officers and passing cars. Police officers unsuccessfully attempted to disperse the unruly crowd. At one point, Benton Harbor Police Chief Samuel Harris fired a shotgun into the air. People started running, and Chief Harris heard several shots coming from approximately 30 feet in front of the officers. Several women in the crowd who knew defendant identified him as the person who fired the shots. The shots were fired into the crowd, in the direction of the police, and one shot hit Roshanda Robinson.

Defendant argues on appeal that there was insufficient evidence that he fired a gun with the specific intent to murder a police officer. Defendant also argues that there was insufficient evidence to convict him of the crime of riot, because there was no evidence that he acted in concert with anyone or to cause any public alarm. We disagree.

[1] Defendant originally received a maximum sentence of 75 years for assault with intent to murder, which was later reduced to 60 years.

This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). "The intent to kill may be proven by inference from any facts in evidence."

Viewed in a light most favorable to the prosecution, the evidence indicated that defendant was part of a large, hostile crowd. Shortly before the shooting, a witness saw defendant pull out a black and gray gun, fire it once into the air, and place it back into the waistband of his pants. A witness also heard defendant refer to the police as "motherf***ers," and state, "when they start shooting, I'm shooting back." Immediately after the police chief fired his shotgun into the air to attempt to disperse the crowd, defendant fired several shots in the direction of the police. A bullet struck Robinson, who was between defendant and the police. The evidence that defendant had directed obscenities at the police and threatened to shoot them, and that defendant then fired several shots in the direction of the police after the police chief fired his warning shot, was sufficient to support an inference that defendant fired his gun with the specific intent to kill a police officer. Although defendant may not have intended to kill or even shoot Robinson, a person may have the requisite state of mind without directing it at any particular victim. *Abraham*, *supra* at 657. The evidence was sufficient to support defendant's conviction of assault with intent to commit murder.

Defendant also argues that there was insufficient evidence to convict him of the crime of riot. MCL 752.541 provides:

> It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm.

Defendant argues that there was insufficient evidence that he acted in concert, or caused public terror or alarm. Under the riot statute, "prohibited conduct includes violent acts that intentionally alarm the public or show a conscious disregard of the risk of alarming the public." *People v Kim*, 245 Mich App 609, 615; 630 NW2d 627 (2001). The prosecutor need not present lay witnesses who testify to a feeling of alarm or fear. *Id.*

Here, there was evidence that defendant was part of a large, hostile crowd of 300 to 400 people who were throwing rocks and projectiles at passing cars and police officers. The evidence that defendant was part of that crowd, that he fired a gun into the air, that he directed obscenities at and threatened to shoot the police, and that he refused to leave when the police ordered the crowd to disperse, supports an inference that he was acting in concert with the larger, hostile group and shared that group's purpose. *People v Garcia*, 31 Mich App 447, 454; 187

NW2d 711 (1971). Further, defendant's conduct of firing a gun into the air in a crowd of 300 to 400 people while directing threats at the police and then firing his gun into the crowd, in the direction of the police, rose to the level of creating a serious risk of public alarm. *Kim, supra* at 615-616. Thus, there was sufficient evidence to convict defendant of the crime of riot.

Next, defendant argues that the trial court improperly informed the prospective jurors during jury voir dire that there had been a riot, which defendant maintains removed from the jury the question whether a riot occurred. Because defendant did not object to the trial court's statements during voir dire, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). In evaluating the prospective jurors' abilities to properly decide this case the trial court questioned them to determine if they had heard or read about a riot that occurred earlier in the year. Whether the disturbance at issue could be characterized as a riot was not a principal issue at trial. Instead, the principal issues involved whether defendant was there, whether he participated, and the extent of his participation. The court informed the prospective jurors that even "if it's shown that the defendant was there, that's no proof that he participated in a riot or that he assaulted anyone." Viewing the trial court's statements in context, defendant has not shown a plain error that affected his substantial rights.

We likewise reject defendant's unpreserved claim that the jury was so contaminated by the trial court's remarks during voir dire that the trial court should have sua sponte ordered a change of venue. As a general rule, venue in criminal actions is in the county where the violation took place. MCL 600.8312. "The burden rests on the defendant to demonstrate the existence of actual prejudice or the presence of strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that the jurors could not set aside their preconceived notions of guilt, notwithstanding their statements to the contrary." *People v Harvey*, 167 Mich App 734, 741-742; 423 NW2d 335 (1988). The totality of the circumstances, including the content of news accounts and the voir dire examination transcript, should be evaluated on appeal in deciding whether a defendant was deprived of a fair and impartial trial due to local prejudice." *Id.*

As previously indicated, the trial court's comments and questions during voir dire were not improper. Further, defendant has not provided evidence of adverse publicity. The prospective jurors generally responded that they did not have much information about the events in question. Defendant never requested a change of venue, and defense counsel did not exercise all of his peremptory challenges before expressing that he was satisfied with the jury. On this record, there is no basis for concluding that a change of venue was warranted.

Defendant also argues that the jury was improperly instructed. This Court generally reviews jury instructions as a whole to determine whether there was any error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). But because defendant did not object to the trial court's instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. Defendant argues that the jury should have been instructed on his theory of the case and should have been instructed on what it meant to act in concert or to cause public terror or alarm. The record discloses that the attorneys discussed the instructions with the trial court before the end of trial, including instructions on acting in concert and public terror. The attorneys agreed to a riot instruction that restated the elements in the statute, and the court offered to give dictionary definitions of "terror" or "alarm." Defense

counsel later expressed satisfaction with the instructions as they were given. On appeal, defendant does not offer any specific instructions that he believes should have been given but were not. Under the circumstances, defendant has not shown that there was any plain instructional error. *Id.*

Defendant also argues that the trial court improperly admitted a prior consistent statement. Defendant does not specifically discuss the challenged statement except to say that it "was that of the victim to a nurse at the hospital," and refers generally to pages of the transcript where the hospital nurse testified that Robinson told her "someone was just shooting a gun off, and she was in the wrong place at the wrong time," and that "she knew who it was, and that someone – and I don't recall who it was, told her that he would pay her off not to tell who shot her." Defendant did not object to these statements, limiting our review to plain error affecting substantial rights. *Id.*

A prior consistent statement offered by a third party is admissible if the declarant testifies at trial and is subject to cross-examination, there was an express or implied charge of fabrication of the declarant's testimony, the declarant's prior statement is consistent with the declarant's challenged testimony, and the prior consistent statement was made before there was a motive to falsify. MRE 801(D)(1)(b); *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000). Here, Robinson testified at trial, defendant's counsel suggested that her testimony was false, her prior statement was not inconsistent with her trial testimony, and her prior statement was made immediately after the event. Under the circumstances, defendant has not established any plain error affecting his substantive rights. *Carines, supra.*

Defendant next argues that the prosecutor's conduct denied him a fair trial. Prosecutorial misconduct issues are decided case by case. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003). This Court considers the prosecutor's conduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, however, defendant did not object to most of the matters that he complains of on appeal, limiting our review of those issues to plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant first argues that the prosecutor elicited irrelevant and prejudicial evidence. Specifically, he challenges Benton Harbor Detective Sergeant McGinnis's testimony that he developed a suspect and went to talk to defendant, that he obtained a photo of defendant already on file, that defendant was identified from a photo lineup (identifying the photos actually used), and that he attempted to locate and arrest defendant two days after the shooting (to explain why gunshot residue testing was not done).

It was defendant's theory that he did not shoot Robinson and that the eyewitness identifications were either mistakes or lies. A defendant's general denial places each element of the charged offense at issue. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Because the identity of the shooter was a principal issue at trial, the evidence regarding the police investigation that led to defendant's identification, and the explanation for why a gunshot residue test was not conducted, were all relevant matters. MRE 401. In addition, defendant's flight from the scene and unwillingness to come forward, and his phone call to Robinson, were all relevant to his possible consciousness of guilt and intent. "Evidence of an

attempt to avoid arrest and flight in a criminal case is relevant, material, admissible, and can lead to an inference of guilt." *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982).

Detective McGinnis's testimony about having a file photo of defendant was volunteered in response to the prosecutor's proper question about what McGinnis did to identify whether defendant was the person identified by the victim and witnesses, as was Detective Hinz's remark about defendant's "previous dealings" with law enforcement, which was given in response to the prosecutor's proper question inquiring into what the detective told defendant "about the case at this point." Not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial, and "an unresponsive, volunteered answer to a proper question is not grounds for granting of a mistrial." *Griffin*, *supra* at 36. To the extent that these answers referred to improper topics, they were brief, they were not emphasized, and no further inquiry into the improper matters was conducted. The answers did not result from improper questioning by the prosecutor and, under the circumstances, did not deny defendant a fair trial.

Defendant also argues that the prosecutor made improper remarks in her closing argument. We find no merit to defendant's claim that the prosecutor improperly gave personal opinions and referred to matters not supported by the evidence when she stated that defendant was filled with anger and hatred of the police, that he decided to shoot at the police, that he shot directly at the police intending to kill, and that he was acting in concert with the crowd to cause public terror and alarm. A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Here, the prosecutor's remarks amounted to fair inferences from the evidence that defendant was part of a crowd that was throwing rocks and bottles and swearing at the police, that defendant referred to the police officers with obscenities, that defendant announced his intention to shoot if the police fired, and that defendant fired a gun through a crowd of people in the direction of the police.

Defendant also contends that the prosecutor misstated the law and undermined the concept of reasonable doubt during voir dire when she said that it was the jurors' duty to resolve any conflicts. The prosecutor suggested to the jury that, while some people do not know how to approach conflicting evidence, it was a jury's duty to decide evidence and, "if there are conflicts you talk about them and you decide what you believe instead of just throwing up your arms and saying I don't know, I don't really want to decide." The trial court properly instructed the jury regarding reasonable doubt, that it was the jury's job to decide the facts, and that the statements of counsel were not evidence. The prosecutor's remarks, considered in context, were not improper.

Defendant next argues that it was improper for the prosecutor to argue in closing argument that defendant acted in concert with other people in the crowd where there was no evidence of any agreement. The prosecutor only reminded the jury of evidence that 300 to 400 people were in the area, throwing rocks and bottles at the police and at passing cars, yelling obscenities at the police, and behaving aggressively and violently. There was evidence that the crowd of people, including defendant, did not back down when the police attempted to disperse them, but rather continued to move toward the small group of police officers who were attempting to control the crowd. The argument that defendant acted in concert with others in the crowd was a reasonable inference from the evidence. *Buckey, supra.*

Defendant also argues that it was improper for the prosecutor to suggest that the jury could determine defendant's intent to kill from his use of a gun. "The intent to kill may be proven by inference from any facts in evidence." *Abraham, supra*. In this case, there was evidence that defendant fired a gun several times into a crowd, in the direction of the police. Contrary to what defendant argues on appeal, the prosecutor did not argue that the use of a gun automatically established intent to kill, and the argument that the use of a gun could be considered in determining defendant's intent was not improper.

Defendant next argues that the riot statute is unconstitutionally vague. Because defendant never challenged the constitutionality of the riot statute in the trial court, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra*. This Court has previously upheld the constitutionality of the riot statute. *Garcia, supra* at 456. In addition, contrary to what defendant asserts, the statute does not restrict constitutional activity; rather, it only prohibits violent conduct, which is not protected by the constitution. *Kim, supra* at 618.

Defendant next argues that he was denied a fair trial because defense counsel was ineffective. The trial court considered this issue below and found that defendant failed to show that he was prejudiced by counsel's actions or that the result of the proceeding would have been different in the absence of the alleged errors.

To establish ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

With respect to defendant's claims that defense counsel was ineffective for not preserving issues previously discussed in this opinion, defendant has not shown that these other matters involved prejudicial error. Defense counsel was not ineffective for failing to object to these matters at trial. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (defense counsel is not required to make futile motions or objections).

Defendant also argues that counsel was ineffective for failing to move to suppress testimony that witnesses heard defendant say that he would shoot back if the police started shooting. Defendant argues that these statements should have been suppressed because they constituted prior bad acts evidence subject to exclusion under MRE 404(b), did not accurately reflect what he actually said, were inconsistent with evidence that he did not shoot at the police but only shot into the air, and were hearsay. There is no merit to these arguments. Defendant's own statements were admissible under MRE 801(d)(2). Further, the statements were directly related to the charged offenses and, therefore, were not evidence of "other" or "similar" crimes or bad acts under MRE 404(b)(1). Finally, the question whether the witnesses' testimony accurately revealed what defendant said was a matter for the jury. For these reasons, we find no merit to defendant's claims that defense counsel was ineffective.

Next, defendant argues that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. We review the trial court's decision for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). At an evidentiary hearing, Travis Burton testified that a person who is now deceased shot Robinson. The trial court found Burton's testimony suspect, and cumulative to evidence already presented at trial.

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Id.* We agree that evidence that defendant was not the shooter was cumulative of other testimony presented at trial, which was rejected by the jury. In addition, Burton testified that he was with defendant at the time of the shooting, that they had a conversation, and that defendant knew he was there. Defendant failed to show that he could not have discovered and produced this witness using reasonable diligence. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Finally, defendant raises several sentencing issues. First, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that the trial court erred in relying on facts included in the presentence report that were not determined by a jury. However, our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 142, 164; 715 NW2d 778 (2006). Where, as here, "the defendant receives a sentence within the statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.*, slip op at 24.

Defendant also challenges the scoring of offense variables 9, 12, 19 and 20 of the sentencing guidelines. The trial court prepared a sentencing information report (SIR) for both the assault with intent to commit murder conviction and the riot conviction. Defendant does not distinguish between the scoring for each of these offenses. Unless otherwise indicated, the challenged offense variables were scored the same on each SIR. Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

The trial court assessed ten points for OV 9, reflecting that there were between two and nine victims. MCL 777.39(1)(c). For purposes of OV 9, each person who is placed in danger of injury or loss of life is considered a victim. MCL 777.39(2)(a). The evidence showed that defendant was part of a crowd of 300 to 400 people and fired a gun into the crowd, in the direction of a group of police officers. The evidence was more than sufficient to support the score of ten points for OV 9.

Fifteen points were scored for OV 19, which reflects the trial court's determination that defendant used force or the threat of force against another person to interfere with or attempt to interfere with the administration of justice or the rendering of emergency services. MCL 777.49(b). There was evidence that the police were attempting to quell a riot when defendant fired toward them, through a crowd of people. "Law enforcement officers are an integral component in the administration of justice, regardless of whether they are operating directly

pursuant to a court order." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). The evidence that defendant fired a gun in the direction of police officers who were attempting to enforce the peace provided ample evidentiary support for the 15-point score for OV 19.

Fifty points were scored for OV 20, reflecting the trial court's determination that defendant committed an act of terrorism. MCL 777.49a(1)(b). OV 20 incorporates the definitions in MCL 750.543b, which defines "act of terrorism" and "terrorist" as a willful and deliberate act that is a violent felony under the laws of this state, that the person knows or has reason to know is dangerous to human life, that is intended to intimidate or coerce a civilian population, or influence or affect the conduct of a unit of government through intimidation or coercion. We agree with the trial court that defendant's discharge of a gun toward a police unit that was attempting to disperse a hostile crowd of people provided sufficient support for the 50-point score.

Defendant also argues that OV 12 (contemporaneous criminal acts), MCL 777.42, was improperly scored at five points. Because defense counsel expressly agreed at sentencing that OV 12 was correctly scored at five points, this issue is waived, thereby extinguishing any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Furthermore, any error in the scoring of OV 12 was harmless. First, OV 12 was scored at five points only on the SIR for defendant's riot conviction; zero points were scored for OV 12 on the SIR for the assault conviction. Thus, any scoring error does not affect defendant's sentence for the assault conviction. Second, even if OV 12 were incorrectly scored at zero points for the riot conviction, it would not affect defendant's sentencing guidelines range for that offense. Thus, any error in scoring OV 12 for the riot conviction does not warrant resentencing for that offense. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Because defendant was sentenced within the appropriate sentencing guidelines range, and defendant has not established a scoring error that affects that range, or shown that the trial court relied on inaccurate information at sentencing, we must affirm his sentences. MCL 769.34(10).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell